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# WILL SEX PREVAIL OVER THE BEST INTEREST OF THE CHILD?

BY ELIZABETH C. BARCENA

## FACTS

At birth, Michael Kantaras was biologically, a woman - "Margo".<sup>1</sup> But from an early age she felt as though she was a man trapped inside a female body.<sup>2</sup> In hopes of easing the conflict between the sexual identity her body gave and the sexual identity she believed herself to be, "Margo" underwent sexual reconstructive surgery.<sup>3</sup> As of the date of this article, Michael had successfully completed two of the three operations necessary to fully become a "man".<sup>4</sup>

In 1988, Michael met Linda Forsythe and within a year they were married.<sup>5</sup> After a few months, and with Linda's approval, Michael adopted Matthew, Linda's one-month-old son from a previous marriage.<sup>6</sup> In 1992, Linda was artificially inseminated with the donated sperm of Michael's brother and gave birth to a daughter named Irina,<sup>7</sup> who Michael has yet to legally adopt.

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<sup>1</sup> Kantaras v. Kantaras, No. 98-5375CA (Fla. 6<sup>th</sup> Cir. Ct. Feb. 21, 2003), available at [http://www.courtstv.com/trials/kantaras/docs/birth\\_record1.html](http://www.courtstv.com/trials/kantaras/docs/birth_record1.html).

<sup>2</sup> *Id.*

<sup>3</sup> Kantaras v. Kantaras, No. 98-5375CA (Fla. 6<sup>th</sup> Cir. Ct. Feb. 21, 2003), available at <http://www.courtstv.com/trials/kantaras/docs/gender1.html>.

<sup>4</sup> See Court TV, *Transsexual Custody Battle Begins with Age Old Question: What Makes a Man?* (Jan. 22, 2002), available at [http://www.courtstv.com/trials/kantaras/012202\\_ctv.html](http://www.courtstv.com/trials/kantaras/012202_ctv.html).

<sup>5</sup> Court TV Online, *supra* note 2; Court TV Online, *Chronology: Key Dates in Michael Kantaras' Life* (2000) available at <http://www.courtstv.com/trials/hantaras/chronology.html>.

<sup>6</sup> Kantaras v. Kantaras, No. 98-5375CA (Fla. 6<sup>th</sup> Cir. Ct. Feb. 21, 2003), available at <http://www.courtstv.com/trials/kantaras/docs/adopt1.html>

<sup>7</sup> Kantaras v. Kantaras, No. 98-5375CA (Fla. 6<sup>th</sup> Cir. Ct. Feb. 21, 2003), available at <http://www.courtstv.com/trials/kantaras/docs/adopt1.html>.

By 1998, however, their relationship began to deteriorate, with Michael filing divorce papers in September of 1998,<sup>8</sup> and the following two years consisted of several custody hearings. Linda married Michael fully aware of his past and remained loyal to the obvious privacy concerns during their legal disputes.<sup>9</sup>

Though Linda had never used Michael's sexuality as leverage in the past, in 2002 Linda changed the grounds for her custody petition to the court.<sup>10</sup> Apparently, Michael's petition to the court for permission to leave Florida with the children influenced her to use Michael's past as the foundation of her case.<sup>11</sup> Linda claimed her marriage to Michael was void because same-sex marriages are statutorily prohibited in Florida.<sup>12</sup> She further claimed Michael's adoption of the two children was fraudulent since he is, according to Linda's testimony, legally a woman.<sup>13</sup> Accordingly, Florida's prohibitions of gay adoptions void any legal recognition of his parental rights.<sup>14</sup>

Consequently, their custody battle now balances on Florida's adamant prohibition against same-sex unions and gay adoptions. Because Linda is a woman, and Michael was born a woman, their marriage may be void from its very inception, as homosexual unions, of any kind, originating in any jurisdiction, are explicitly barred from recognition in Florida.<sup>15</sup> Though Linda has premised her case completely on Florida's same-sex laws (thus, asking the court to find their marriage void), she has petitioned the court for alimony support and filed for child support payments.<sup>16</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> Court TV, *supra* note 2.

<sup>10</sup> Kantaras v. Kantaras, No. 98-5375CA (Fla. 6<sup>th</sup> Cir. Ct. Feb. 21, 2003), available at <http://www.courtTV.com/trials/kantaras/chronology.html>.

<sup>11</sup> *Id.*

<sup>12</sup> FLA. STAT. Ch. 741.212 (Lexis 2002)(generally stating, "Marriages between persons of the same sex entered into in any jurisdiction...are not recognized for any purpose in this state").

<sup>13</sup> Court TV, *supra* note 2.

<sup>14</sup> FLA. STAT. Ch. 63.042(3) (West 1997)(stating, "No person eligible to adopt under this statute may adopt if that person is a homosexual).

<sup>15</sup> *Supra* note 10.

<sup>16</sup> *Supra* note 8.

Facially, her request does not seem out of the ordinary when one considers the financial responsibility an adoptive parent assumes, since divorce or separation does not nullify the enduring legal obligations of an adoptive parent.<sup>17</sup> Her request for child support does seem misplaced, however, because Linda contends the adoption was fraudulent and void under Florida law.<sup>18</sup>

## LIKELY OUTCOMES

If Judge O'Brien considers Michael to "legally" be a man (without any consideration of homosexuality), then his decision should rest solely on Florida's "best interest of the child" standard.<sup>19</sup> In other words, it would be handled like a typical custody dispute. However, it has been more than a year since attorneys presented their closing arguments in this case, and after several postponements, a decision has yet to be rendered. This delay is likely to represent the court's careful consideration of Michael's sexuality and the outcome of this case will likely reflect such consideration.

If, however, Judge O'Brien considers Michael to be a woman, then Florida's homosexual laws may apply. In which case, the Kantaras' union would be void and unrecognized in Florida.<sup>20</sup> If Judge O'Brien finds Michael is a gay woman, then he is likely to conclude that Michael was a gay woman fraudulently adopting the children, thus, violating Florida's law prohibiting gay adoptions.<sup>21</sup>

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<sup>17</sup> L.J.R. v. T.T., 739 So.2d 1283, 1284 (Fla. 1<sup>st</sup> Dist. Ct. App. 1999) (stating "Adoption is the legal equivalent of biological parenthood, so that a decree of adoption renders the adoptee, for all intents and purposes, the child of the adoptive parent).

<sup>18</sup> See generally, *supra* note 11.

<sup>19</sup> FLA. STAT. Ch 61.13 (Lexis 2002); see also, Bryan v. Engram, 779 So.2d 586, 587 (Fla. 5<sup>th</sup> Dist. Ct. App. 2001).

<sup>20</sup> *Supra* note 10.

<sup>21</sup> *Supra* note 11.

## ANALYSIS OF FLORIDA CASE LAW

A strict textual analysis of Florida's adoption statute will undeniably prohibit any further consideration of Michael's competence as a parent. However, numerous gay petitioners have attacked Florida's statute for its blanket prohibition against gay adoptions,<sup>22</sup> yet the state remains unable to arrive at a consensus regarding the constitutionality of its gay adoption statute.

One case, though not binding on Florida's Sixth Circuit, may provide Judge O'Brien with some guidance.<sup>23</sup> In *Seebol*, a gay man with impeccable credentials was denied an opportunity to adopt solely premised on his sexual orientation.<sup>24</sup> The 16<sup>th</sup> Judicial Circuit for Monroe County found Florida's ban on homosexual adoptions unconstitutional.<sup>25</sup> This decision was never appealed; hence, the decision still acts as precedent in Monroe County.<sup>26</sup>

Shortly thereafter, *Cox v. HRS* attempted to duplicate the *Seebol* decision, with a Florida Circuit Court finding the statute unconstitutional.<sup>27</sup> However, on appeal, all eleven judges in the Second District Court of Appeals agreed to overturn the Circuit Court.<sup>28</sup> Before the Second District's decision could be appealed the plaintiffs voluntarily dismissed their case.<sup>29</sup>

The most recent case contesting the constitutionality of Florida's prohibition of gay adoptions was *Lofton v. Kearney* in the U.S. District Court for the Southern District of Florida, Key West

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<sup>22</sup> See generally, *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1374 (S.D. Fla. 2001); *Seebol v. Farie*, 16 Fla. L. Weekly C52 (16<sup>th</sup> Cir. Ct. 1991).

<sup>23</sup> *Seebol v. Farie*, 16 Fla. L. Weekly C52 (16<sup>th</sup> Cir. Ct. 1991).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Monroe County is in the 16<sup>th</sup> Circuit of Florida, and falls under the jurisdiction of the Third District Court of Appeals.

<sup>27</sup> *Cox v. Health & Rehabilitative Services of Florida*, 627 So. 2d 1210, 1220 (Fla. 2d Dist. Ct. App. 1993).

<sup>28</sup> *Cox v. Health & Rehabilitative Services of Florida*, 656 So.2d 902, 903 (FL 1995).

<sup>29</sup> Terl, Allan, An Essay on the History of Lesbian and Gay Rights in Florida, 24 Nova L.Rev. 793 (2000) (citing *Two Men Give Up Fight to Adopt Handicapped Kids*, Miami Herald, Dec. 15, 1995, at 5B).

Division.<sup>30</sup> *Lofton* sued Florida's Department of Children and Families, claiming an Equal Protection violation.<sup>31</sup> The District Court granted defendant's summary judgment, asserting the right to adopt was not a fundamental right protected by the Equal Protection Clause.<sup>32</sup> The court also refused to apply a strict scrutiny analysis of Florida's gay adoption statute because homosexuals were not a suspect class, thereby relying on a rational basis analysis.<sup>33</sup> Finally, Florida's desire to place children with married couples was found to serve a legitimate governmental interest.<sup>34</sup>

From reviewing this precedent, if Judge O'Brien considers Michael a gay woman and reviews his case against Florida's gay adoption statute, the adoption is likely to be found void. Thus, custody will likely be awarded to Linda without any consideration of the children's best interest.

If the court does void the adoption, Judge O'Brien may still consider same-sex custody cases for guidance. For example, in *Music v. Rachford*, a lesbian's claim for visitation of her ex-partner's biological child was denied.<sup>35</sup> Although the couple had a four-year relationship where the child was raised between the two of them, the court stated that "visitation rights are, with regard to a non-parent, statutory, and the court has no inherent authority to award visitation."<sup>36</sup>

Other cases in Florida involving gay custody pertain to the natural children of biological parents where one parent, usually the mother, becomes involved in a same-sex relationship.<sup>37</sup> This string

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<sup>30</sup> *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1374 (S.D. Fla. 2001).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1381-1385.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Music v. Rachford*, 654 So.2d 1234, 1235 (Fla. 1<sup>st</sup> Dist. Ct. App. 1995).

<sup>36</sup> *Id.*

<sup>37</sup> *Cf.*, *Jacoby v. Jacoby*, 763 So.2d 410, 416 (Fla. 2<sup>nd</sup> Dist. Ct. App. 2000) (finding lower court abused its discretion when it penalized lesbian mother by considering her sexual orientation without evidence of harm to the children); *Ward v. Ward*, 742 So.2d 250, 252 (Fla. 1996) (awarding custody to the natural father with a criminal conviction over natural mother because of her sexual orientation).

of cases would be irrelevant to the *Kantaros* case, as only Linda is a biological parent. Furthermore, Florida courts are unable to extend custody or visitation to unnatural, i.e. de facto, parents absent a legislative directive.<sup>38</sup> Therefore, even under Florida's same-sex custody cases, Linda is likely to be awarded custody, regardless of Michael's parenting skills.

## TRANSGENDERISM

Considering Florida's case law, it appears unlikely that Michael would be awarded custody. However, since the legalities of transgenderism are in the very early stages of judicial recognition, Judge O'Brien may consider case law from outside of Florida's borders. In fact, most transgender cases, regardless of the country they originate in, receive guidance from any transgender case arising in any jurisdiction from around the world.<sup>39</sup>

In 1976, New Jersey found the marriage between a man and a male to female transgender to be valid.<sup>40</sup> The court reasoned that once a transgender has "become physically and psychologically unified and fully capable of sexual activity consistent with the reconciled sexual attributes of gender and anatomy....[the transgender] should be considered a member of the [new] sex for marital purposes."<sup>41</sup> The court further ordered the husband to pay alimony to the male to female spouse.<sup>42</sup>

The most recent case in the United States regarding transgenderism is *In The Matter of the Estate of Gardiner*.<sup>43</sup> In *Gardiner*, the Supreme Court of Kansas denied a male to female transgender standing to sue her deceased husband's doctor in a wrongful death claim.<sup>44</sup> The court found the legislature responsible for defining the parameters of marriage and considered

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<sup>38</sup> *Supra* note 9 at 1235.

<sup>39</sup> See, *In re Estate of Gardiner*, 42 P.3d 120, 124-135 (KA. 2002); *Littleton v. Prange*, 9 S.W. 3d 223, 225-231 (Tex. App. 1999).

<sup>40</sup> *M.T. v. J.T.*, 140 N.J.Super. 77, 90 (N.J. Super. Ct. App. Div. 1976).

<sup>41</sup> *Id.* at 90.

<sup>42</sup> *Id.*

<sup>43</sup> *Supra* note 13.

<sup>44</sup> *Id.* at 136.

transgenderism an issue of public policy to be dealt with legislatively, rather than judicially.<sup>45</sup>

The most relevant case to transgender custody and visitation is *J.L.S. v. S.D.S.*<sup>46</sup> In *J.L.S.*, a husband and wife were divorced after the husband began pursuing sex reassignment.<sup>47</sup> Part of his reassignment therapy required him to participate in a year-long “Real Life Test” where he had to live as a woman twenty-four hours a day.<sup>48</sup> The Circuit Court of St. Charles County had awarded the father visitation after his yearlong test was complete.<sup>49</sup> However, on appeal the father’s visitation rights were denied because the evidence did not show that visits would be in the best interest of the children.<sup>50</sup>

Though transgender cases from different jurisdictions within the U.S. may provide little guidance for the Kantaras case, such review demonstrates that other states have been more exposed to transgender issues than Florida. It remains to be seen if Florida will follow the precedent existing in other states. If Judge O’Brien believes that sex reassignment legally changes the sex of a transgendered person, thereby agreeing with New Jersey precedent, then Michael should be considered a man under Florida law and have his custody petition evaluated strictly under the best interest of the child standard. However, if Judge O’Brien follows Missouri and Kansas precedent, then Michael will continue to be a woman under Florida law and custody will likely be awarded to Linda.

## CONCLUSION

Even though this case appears to be a custody dispute, in reality, it is a battle over the legal recognition of transgendered people in Florida.<sup>51</sup> Linda and Michael were both consenting adults when they married each other. Linda had full knowledge of

<sup>45</sup> *Id.*

<sup>46</sup> *J.L.S. v. S.D.S.*, 943 S.W.2d 766 (Mo. Ct. App. 1997).

<sup>47</sup> *Id.* at 769-770.

<sup>48</sup> *Id.* at 769.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 780-781.

<sup>51</sup> Court TV, *supra* note 2.



when they married each other. Linda had full knowledge of Michael's past for years and had accepted the confusion over his sexual identity. Michael adopted Linda's son and agreed to Linda's artificial insemination by his brother.<sup>52</sup>

Linda consented to this family, and consciously subjected herself, and her son, to the repercussions of loving and living with Michael. She chose to love him, and should now be required by law to abide by those choices. It is unfair to strip these children of the father she chose for them. Linda played the "sex-change" card, and now the children must suffer the consequences of, what she has called, "a mistake". The consequences of Linda's choice to use Michael's past against him will have ripple effects: the children will lose medical insurance eligibility under Michael's coverage and will be unable to recover any future benefits as Michael's legal dependents (i.e. wrongful death claims, Social Security, life insurance, and intestate inheritance). Most importantly, the children will be stripped of the only father they have ever known and loved, resulting from their mother's unrelenting desire to win full custody.

## CASE UPDATE

Shortly after the submission of this article, Judge O'Brien rendered a decision in the *Kantaras* case.<sup>53</sup> In an 809-page decision, Judge O'Brien offered the most thorough explanation on sex reassignment in legal history. No other transsexual case in the world has ever provided a more in-depth exposition of medical testimony.

In summary, Judge O'Brien asserted that Michael Kantaras would be the primary residential parent of the children.<sup>54</sup> However, this decision was founded on the conclusion that Michael was legally male.<sup>55</sup> After the plethora of evidence confirming Michael's sexuality as male, the decision to award custody to

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<sup>52</sup> Court TV, *supra* note 6.

<sup>53</sup> *Kantaras v. Kantaras*, No. 98-5375CA (Fla. 6<sup>th</sup> Cir. Ct. Feb. 21, 2003), available at <http://www.courtTV.com/trials/kantaras/docs/opinion.pdf>.

<sup>54</sup> *Id.* at 790.

<sup>55</sup> *See id.* at 795.

Michael was deficiently explained, with Judge O'Brien offering little discussion of Florida's best interest of the child standard. Given the lack of support for his custodial award, Judge O'Brien's opinion will likely receive appellate review and he may ultimately be criticized for his abuse of discretion. Additionally, Judge O'Brien was very abrupt in his dismissal of Florida's same-sex laws. Appellate courts may not be willing to consider the Kantaras case as completely distinct from same-sex cases. Therefore Judge O'Brien's inability to thoroughly explain "why" same-sex laws did not apply may create a weakness in his opinion susceptible to reversal.

In conclusion, although Judge O'Brien's recent opinion may lack sufficient weight to withstand appellate review, it is a groundbreaking decision and will undeniably provide the framework for transsexual individuals attempting to legally reassign their sex while maintaining ties with their children.

